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SUPREME COURT, U.S.

No. 06-476

In The

Supreme Court of the United States

Gary P Brogdon
Petitioner,

V.

Charles Condon, Attorney General
for the State of South Carolina
Respondent.

On Writ Of Certiorari To The Court Of
Appeals To The Fourth Circuit

PETITION FOR REHEARING OF WRIT OF CERTIORARI

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CERTIFICATION

Applicant claims the controlling effect of the ineffective assistance of counsel at trial by the failure of counsel to recognize or investigate the rules governing consolidation in this state and not moving to sever the two independent cases for separate trials, creating an unconstitutional and highly prejudicial trial, since the cases were not a single chain of circumstances and required different evidence and different witnesses. This argument is found in the first pages of Applicants' brief for rehearing. Even in the cases ruled on by the Supreme Court of South Carolina, counsel moved to sever the charges and the judges ruled on the consolidation issue showing Applicants' counsel performed unreasonably.

Applicant claims the controlling effect of the trial judges' inadequate recognition this was a consolidated trial of two distinct and separate cases further promoted the injustice to Applicant. Along with problematic jury instructions and not informing the jury to keep the evidence separate promoted the jury to consolidate the evidence to gain a conviction, which lessened the States' burden of proof.

[1]Applicant claims the ineffective assistance of direct review counsel by failure to know and articulate a brief on the consolidation issue (which was far better an issue than those raised) promoted the injustice received by the Applicant to receive a just direct review. This applies to Post-Conviction counsel as both are outlined in Applicants' brief.

Applicant claims if any counsel in the beginning would have raised this issue the Courts would have had no choice but to overturn the conviction by the rules in this state. Applicant claims the process and burden of proof gets more rigorous at each stage of appeal but claims some court should adjudicate these issues on their merits. Especially since

Applicant submits this brief in good faith.

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[1] as quoted in **Gray v. Greer**, 800 F.2d. 644,646 (7th Cir. 1986)

APPELLANTS' REHEARING ARGUMENT

The Appellant is seeking a rehearing of the denial decision of this Court, dated November 27, 2006. Appellant believes this case has strong merit for reversal of the conviction for the ineffective assistance of counsel that was received from all of Appellant's counsels throughout the legal process.

Appellant will start with the first counsel. Appellant received ineffective assistance of counsel for not knowng the laws governing the consolidation of cases for one trial.

> The South Carolina Rules of Criminal Procedure Rule - Motions in General states in Annotations Rule 4 : "Joinder is proper if the offenses 1) are of the same general nature or character and spring from the same series of transactions, 2) are committed by the same offender, and 3) require the same or similar proof. **State v. Carter**, ___SC___ 478 S.E.2d 86, 88 (Ct. App. 1996)"

Appellant claims the trial court, prosecution and defense counsel failed to afford the defendant his right to a fair trial protected by the South Carolina Constitution, the 5th and 6th Amendments to the United States Constitution, the Federal Criminal Rules of Procedure 8(a) and his 14th Amendment rights to due process and equal protection of law have been violated by the improper joinder/consolidation of charges adjudicated in the General Sessions of Berkeley County on November 9th, 1982.

Appellant was tried for two unrelated incidents that took place more than a year apart. The behavior alleged in each case was similar. However, the evidence was disparate, as shown by jury's ultimate acquittal on the 1981 charge.

Appellant claims prosecuting these two cases before the same trial court and the same jury was fundamentally unfair, contrary to all constitutional safeguards and precedent case law, creating insurmountable and unavoidable prejudice to the Appellant. Not even meticulous instructions to the jury

from start to finish could have cured the prejudice, even if the trial court had made an attempt at a limiting instruction concerning joinder/consolidation of the cases. Appellant claims, no where in the record or transcripts, was there ever a statement to the jury, this was two separate and distinct cases on trial and to only use the evidence independently for their' respective case.

Appellant asserts even where a single transaction is on trial and evidence from other similar crimes is allowed to be admitted under the **Lyle** rule, the South Carolina Supreme Court noted in **State v. Timmons**, 488 S.E.2d. 323 that:

> "On the merits, the general rule is that when evidence of other crimes is admitted for a specific purpose, the judge is required to instruct the jury to limit their consideration of this evidence for the particular purpose for which it is offered. **See State v. Steadman**, 216 S.C. 579, 59 S.E.2d. 168 (1950)."

Criminal charges are properly joined only when they arise from the same transactions and are provable by the same evidence. **State v. Avery**, 333 S.C. 284, 509 S.E.2d 476 (1988); **State v. Middleton**, 288 S.C. 21, 339 S.E.2d 692 (1988). Even if charges are similar in nature, they should not be tried together unless they arise from the same circumstances and involve the same evidence; otherwise, the presentation of unrelated evidence violates **State v. Lyle**, 125 S.C. 406, 118 S.E. 803 (1923). **State v. Tate**, 286 S.C. 462, 334 S.E.2d 289 (1985). The fundamental rules controlling joinder were well-developed long before Appellant's trial. **See, e.g., City of Greenville v. Chapman,** 210 S.C. 157, 41 S.E.2d 865 (1947).

If Appellant had been tried separately on each charge, evidence regarding the other incident would have violated **Lyle, supra.** The charges were improperly joined because they did not arise from the same chain of circumstances or involve the same evidence.

The Court of Appeals of South Carolina held in **State v.**

Jones, 479 S.E.2d. 517 (S.C. App. 1996):

> "The propriety of consolidating charges for trial has recently reiterated in **State v. Smith**,___ S.C.___, 470 S.E.2d. 364 (1996):Where the offenses charged in separate indictments are of the same general nature involving connected transactions closely related in kind, place and character, the trial judge has the power, in his discretion, to order the indictments tried together if the defendant's substantive rights would not be prejudiced. **State v. Sullivan**, 277 S.C. 35, 282 S.E.2d. 838 (1981); **State v. Williams**, 263 S.C. 290, 210 S.E.2d. 298 (1974); **McCrary v. State**, 249 S.C. 14, 152 S.E.2d. 235 (1969)[(1967)]. Id. at ____, 470 S.E.2d. 365. Offenses are considered to be of the same general nature where they are interconnected. **State v. Harry**, ___ S.C.___, 468 S.E.2d. 76 (Ct. App. 1996).

Conversely, offenses which are of the same general nature, but do not arise out of a single chain of circumstances and are not provable by the same evidence may not properly be tried together. **See e. g. State v. Middleton**, 288 S.C. 21, 339 S.E.2d. 692 (1986) (holding although prison escapee committed two murders within a few miles of each other and attempted an armed robbery, the trial judge erred in consolidating the charges for one trial where the crimes did not arise out of a single chain of circumstances and they required different evidence), cert. denied, 488 U.S. 872, 109 S. Ct. 189, 102 L.Ed.2d. 158 (1988); **State v. Tate**, 286 S.C.462, 334S.E.2d. 289 (Ct. App.1985)(holding joint trial on identical but unrelated forgeries violated defendant's right to a fair trial)."**Id at 519**.

The Court of Appeals of South Carolina in **State v. Tate, Supra**:

> "...held that: (1) joinder of offenses in one indictment and trial was improper; (2) offenses did not arise out of a single chain of circumstances; (3) offenses were

not provable same evidence; and (4) joinder would be prejudicial. Reversed and remanded...offenses did not arise out of a single chain of circumstances so as to satisfy joinder of charges in indictment, where they were not in substance a single course of conduct or connected transactions...offenses were not provable by the same evidence, for purposes of joining offenses in one indictment and trying them together, where charges were supported by testimony of different witnesses... Joinder of two...charges in one indictment and trial would be prejudicial, where it was likely jury would infer criminal disposition based on evidence of one (offense) and on that basis alone find defendant guilty of another (offense) in that (offenses) were similar...**City of Greenville v. Chapman**, 210 S.C.157, 41 S.E.2d 865,867(1947) ... **See Drew v. United States**, 331 F.2d 85,89-90 (4thCir. 1964)." **Id. at 289-290.**

The Supreme Court of South Carolina held in **State v. Middleton, Supra**:

"Applicant's first contention is the trial judge erred in consolidating the charges for trial. We agree. Middleton escaped from a prison work detail near Goose Creek on June 8th, 1984. According to the charges, he raped and murdered Janell Gardner on June 9th, and Shirley Mae Mack on June 10th. The victims were asphyxiated, and their bodies were mutilated... The State argues consolidation was justified, alleging all the crimes were part of a crime spree. **See State v. Woomer**, 276 S.C. 258,277 S.E.2d. 696 (1981). In support of this contention, the State notes the similarity of the murders, and the fact the crimes were committed within a radius of a few miles. The State also contends the same knife was used in the crimes. However, this case clearly fails to meet the requirements for consolidation. The crimes

did not arise out of a single chain of circumstances, and required different proof. Furthermore, the prejudice is apparent. **See State v. Tate, (supra)**, citing **City of Greenville v. Chapman ,(supra)**. It is evident the charges did not arise out of the same transaction. **State v. Whitner**,238 S.C.244, 89 S.E.2d. 701 (1955)." **Id at 693**.

Appellant's acquittal on the 1981 charge did not mitigate the prejudice he suffered by the presentation of irrelevant evidence. Even though he was acquitted of the 1981 offense, the entire body of evidence of that charge was presented to the jury and that evidence had no place in the trial of the alleged 1982 case and should have been withheld. Appellant claims this undermines the reliability of the jury's verdict and leaves more than a reasonable doubt as to how the decision was reached, by how and what evidence was used. It could be the jury used the evidence cumulatively in reaching its' verdict, using some evidence from each alleged crime.

Appellant asserts his due process and equal protection rights, as guaranteed by the 14th Amendment, were violated by the trial court for failing to address the inherent prejudice to the defendant to defend himself against two unrelated cases at the same time. When the State brings multiple indictments to the trial court and it is apparent that they arise out of separate transactions, this is tantamount to a formal motion for consolidation by the State. It is the legal responsibility of the trial court to address this issue by directing the State to proceed on just one case only, in order for the trial court to gain subject matter jurisdiction.

By state and federal rule as noted in **State v. Whitner, Supra**:

> "The rule in this state is that distinct offenses - felonies or misdemeanors - may be charged in separate counts of the same indictment, whether growing out of the same transaction or not. If the several offenses charged do not grow out of the same

transaction, then the proper practice is to require the prosecuting officer to elect upon which count he will proceed." **Id at 711**.

Consequently, if the charges are in several indictments and do not grow out of the same transaction, then it is the responsibility of the trial court to require the State to elect upon which case he will prosecute.

Although not all of defense counsel's errors constitute ineffective assistance of counsel, when those errors are contrary to sound trial strategy and those specific acts or omissions are so unreasonable to allow the accused to be subjected to unavoidable prejudice, the accused deserves relief as established by **Strickland v. Washington**, 466 U.S. 668 (1984). It could only be the very rarest of cases that a defense counsel would believe it would be best to allow two similar, but unconnected cases, be tried at the same time, and the possibility of the jury using the evidence cumulatively looms large. Appellant claims, if this was trial counsel's trial strategy, it was so ill chosen that it permeated the entire trial with obvious unfairness.

The trial judge swore in the jury, with the following statement:

> "Now you have previously been advised that the State has indicted Gary P. Brogdon for kidnapping, criminal sexual conduct, aggrevated [sic] assault and battery and assault with a deadly weapon. And the charges, of course are based upon three indictments which the Solicitor will either read or explain to you in his opening statement. "

The trial judge never made a statement this was two distinct and separate cases and the evidence must be kept separate and not used cumulatively. Contrarily, the trial judge made the following statement before jury deliberations:

> "Now, as jurors, you have a right to believe a small portion of a witness testimony and to discard the larger, or vice versa. You may believe the testimony

of a single witness against that of many witnesses or the other way around."

"Throughout this entire process, you have but one single objective and that is to seek the truth regardless or from what witness the testimony may have come."

Appellant points out number 3 in **Strickland v. Washington:**

"The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." Pp. 696-698

The fundamentally fairness of trial was thrown to the side in Appellants' case by all officers of the trial court. The lack of fundamental fairness continued with The Supreme Court of South Carolina and The United District Court of South Carolina and The Fourth Circuit Court of Appeals by the failure to rule on the ineffective assistance of counsel claim and Constitutional claims made by Appellant.

The second ineffective assistance of counsel was the direct review counsel (same counsel as trial counsel) is from the failure of counsel to articulate an argument on the consolidation issue which was far better an issue than those raised.

Again the Appellant points to **Strickland,** 2(b) in part:

"A reasonable probability is a probability sufficient to undermine confidence in the outcome. A court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." Pp.691-696

The totality of the evidence is in focus and the questions in Appellants' briefs throughout this process. The evidence of two unrelated, but similar cases was tried together in an unconstitutional consolidated and highly prejudicial trial. This trial was far from ordinary and the end result was a miscarriage of justice.

In the case at hand, Appellant refers to **Drew v. United**

States, 331 F2d. 85, quoting Circuit Judge McGowan:

> "If separate crimes are to be tried together- and we are not to be understood as intimating any conclusion that this can never, as a practical matter, be successfully undertaken- both court and counsel must recognize that they are assuming a difficult task the performance of which calls for a vigilant precision in speech and action far beyond that required in the ordinary trial."

In order to establish a claim that appellate counsel was ineffective for failing to pursue a claim on direct appeal, the applicant must normally demonstrate (1) that his "counsel's representation fell below an objective standard of reasonableness" in light of the professional norms, **Strickland,** and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," **Id** at 694.

> "Notwithstanding Barnes, [**Jones v. Barnes**, 463 U.S. 745,752 (1983)], it is still possible to bring a Strickland claim based on counsel's failure to raise a particular claim" on direct appeal, the Supreme Court has recently reiterated that "it [will be] difficult to demonstrate that counsel was incompetent." Robbins, 120 S.Ct. at 765. Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." **Id.** (quoting **Gray v. Greer**, 800 F.2d 644,646 (7th Cir. 1986).

Appellant claims if, direct review counsel had articulated an argument concerning this improperly consolidated trial before the Supreme Court of South Carolina, the decision of the Court would have had no choice but to overturn the conviction by the decisions that have been decided by the Court concerning this issue. Reviewing the precedent cases and all cases reviewed by the Supreme Court of South Carolina concerning consolidation, it is apparent the Court has not wavered in its' rulings against consolidation of cases

that do not fit the requirements of consolidation. At least in those cases presented to the Supreme Court of South Carolina, the State made a formal motion for consolidation and the trial judge ruled on that issue and trial counsel at least made an attempt to sever the cases showing Appellant's defense counsel fell below an objective standard of reasonableness and it could have been the result of counsel's inexperience. Direct review and PCR counsel may fit this same conclusion.

Appellant believes the consolidation issue stands alone in having the Court adjudicate the issue on the merits with the ineffective assistance of counsel, to have the conviction overturned and barred for retrial for the States' failure to follow their' own rules from the very beginning and throughout the legal process.

Couple this issue with a problematic reasonable doubt and circumstantial evidence charge (as stated in the Order of the PCR judge, the two charges were problematic). Surely, these should be enough to have the conviction overturned. Since all the evidence of both cases was circumstantial and the instructions lessened the States' burden of proof because of all the evidence, that was admitted, did not pertain just to one case, but to two independent and distinct cases.

One has to ask, "How did the jury use the evidence in reaching its' decision, did they use it cumulatively or did they use a little testimony from each alleged victim to gain a single conviction?" What part did the highly prejudicial "**Allen**" charge play in the jury reaching its' decision? What assistance did the defendant receive during the course of trial and post trial hearings?

The Appellant has had paid counsels to file timely appeals and motions throughout this process to get some court to adjudicate these issues on the merits and claims if, the Supreme Court of South Carolina on February 9th , 2001 would have adjudicated the issue on the merits, the conviction would have been overturned. The only untimely

appeal filed was the Habeas Corpus to the United States District Court of South Carolina and that was through counsels' inaccurate timeline to file by the Appellate Defense Office of South Carolina. In retrospect, they are also employees of the State of South Carolina (government employees) and this case has snowballed with ineffective assistance of counsel. Could it be the State knew the Appellant may falter by this inaccurate advice and give up the claims?

Appellant believes Congress's intentions were not to deny the rights guaranteed by the Constitution and its' Amendments (i.e. the right to a fair trial and the right to effective assistance of counsel at trial and post trial hearings) especially in trials occurring before its' enactment of the AEDPA of 1996.

Appellant has spent over 17 years in confinement and is presently on parole for life and feels some court should adjudicate these issues on the merits instead of time bar because of the AEDPA.

Wherefore, Appellant prays for this Court to end this burden by either forcing the Supreme Court of South Carolina to adjudicate the issues on their merits or for this Court to adjudicate this case the proper way the State should have many years ago.

For these reasons stated, Appellant respectfully request this Court step in and adjudicate the issues on the merits and overturn the conviction the Appellant has endured for many years.

Respectfully submitted,

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December 18, 2006